STATEMENT.

This prize case involves intention and preparation to violate a blockade, and attempt (per se) by "loitering." The vessel of 557 tons, with a general cargo on board, was seized by the U. S. S. *Mayflower* on the high seas on July 19, 1898, and was taken into the port of Charleston, district of South Carolina, for adjudication. The owner of the vessel and the cargo claimants filed claims and test affidavits in the form of answers to the libel, setting up formal denials on their own knowledge, or on information and belief derived from the master and the charterers, of intention or attempt to violate the blockade, or that the vessel and cargo were lawful prize. The vessel owner alleged a stipulation of the charter party that the ship should engage only in lawful trade between Nova Scotia and ports of other countries, and an instruction and warning to the master not to attempt to take her into any blockaded port, and the claimants of the cargo alleged instructions to the master to clear the cargo for Kingston, Jamaica, and Vera Cruz, Mexico, but to enter and land the same at Caibarien or Sagua la Grande, Cuba, provided either of those ports was not found to be under blockade; otherwise to convey the cargo to Kingston, Jamaica, and there await orders. (Rec., pp. 4–7.) The depositions *in preparatorio* of the master (p. 22), the chief mate (p. 33), the second mate (p. 38), and the sailor before

the mast (p. 44) showed that the vessel and claimants were British; that the seizure was made about 10 p. m. on July 19, 1898, 21 miles close to northwest from Havana light, at least 13 or 14 miles offshore (pp. 23, 35); that the ship was chartered for a three months' voyage, beginning and ending at Halifax, whence she sailed July 9, carrying a general cargo, which was laden during the latter part of June and the early part of July, consisting of flour, canned goods, and other provisions; that the shippers' instructions were to proceed with all haste, clear for Kingston and Vera Cruz, but to enter the port of Sagua or Caibarien on the north coast of Cuba, as alleged by the claimants; that the charter provided for trade between ports of Canada, the United States, and the West Indies, including open Cuban ports, no contraband to be carried, the charterer to insure against capture. The deponents did not know the names of the consignees or for whose real account, risk, or benefit the goods were to be delivered, or whether the laders were to take the chance of the market for sale.

While proceeding westward along the northern coast of Cuba the vessel was boarded off Nuevitas by an officer of the U. S. S. *Badger*, and the master warned of the blockade and the register indorsed. Subsequently an officer from the *Hudson* boarded and examined the register, and at 6 o'clock on the evening of capture the vessel was boarded by an officer from the *Tecumseh*, to the eastward of Havana, who warned the master not to come any farther in shore, and indorsed the mate's log book to this effect. The deponents alleged that the ship had been steering her course for Kingston without alteration, ex-

cept for safe navigation, and not toward any other port until captured, allowing for the endeavor to follow out the instructions to deliver at Sagua or Caibarien if not blockaded; that upon warning by the *Tecumseh* the course was pointed off shore, but that at 8 o'clock p. m. she returned to her former course, due west. It is to be noted that while the deponents *in preparatorio* testified, generally, that the vessel's destination was Kingston *or* Vera Cruz, the captain testified (p. 28): "She was steering her course towards Kingston. The course was not altered after we saw the ship until we stopped our engines." (p. 29): "I believe the true destination was Kingston, Jamaica;" while the witness Bursey, the second mate, testified (p. 42): "As far as I know her course was always directed towards Vera Cruz," although the same witness associated Vera Cruz and Kingston in other statements of her destination; while the sailor, Shawner, says (p. 47) that he doesn't know what port in particular she was bound for; and the chief mate, Salkus, says (pp. 36, 37), also associating Vera Cruz and Kingston as the destination in other sentences: "We were steering our course for Vera Cruz. * * * Her course was not altered for any port except Vera Cruz. That was the only course she steered. I never heard of any other port than Vera Cruz from the time I left Halifax till we were captured."

All the deponents denied any attempt to enter a blockaded port. It was admitted that the *Newfoundland* had been turned back at Guantanamo in June, and the master testified that a Bermuda newspaper said (p. 31) that a shot had been fired across her bow at that time, to which

she paid no attention. He was not in command then, when the managing owner and claimant here appears to have been in command.

The sailor examined testified (pp. 46, 48) that he had heard from the crew, which he joined at Halifax on July 4, that the vessel had run the blockade before; that it was common report in Halifax.

The cause then came on to be heard on the proof *in preparatorio*, and by decree of August 15 (p. 8) further proof was ordered and the libel amended by striking out the words "in attempting to violate the blockade," etc. (pp. 1, 8, 15). Amended answers were filed thereto, claiming that the amended libel set forth no cause of action and presented no issue which the claimants could meet by plea or answer, and, as stating a mere conclusion of law, was wholly insufficient, whereupon the court, in an opinion filed August 17 (pp. 9–15), restated the order of August 15, allowing further proof to both parties and permitting the discharge of the vessel on stipulation for value. The cargo was subsequently sold (p. 146). Exceptions to the decrees of August 15 and August 17, based upon the claims in the answers to the amended libel, were overruled by the court.

FURTHER PROOF.

On behalf of the Government the following witnesses were examined: Captain Mackenzie (pp. 50–66), Lieutenant Culver, navigating officer (pp. 66–72), and Ensign Pratt (pp. 72–78), all of the *Mayflower;* Lieutenant Evans, commanding the *Tecumseh* (pp. 78–81), and Executive Officer Nickerson, of the *Tecumseh* (pp. 81–83), of whom

Lieutenant Pratt was recalled in reply (p. 131); and on behalf of the claimants the deponents *in preparatorio* were recalled (master, pp. 112–113, 130; chief mate, pp. 114–121; second mate, pp. 121–122; Seaman Shawner, p. 123), and two more seamen (pp. 123–124) with the chief engineer of the *Newfoundland* (pp. 125–130).

An extract from the log of the *Mayflower*, covering the period from 8 p. m. until midnight on July 19, is given on pages 133–4, and on the latter page is a memorandum attached to the chart in evidence in the case, which chart is reproduced as one of the frontispieces to this brief.

The main conflict in the evidence relates to the movements of the *Newfoundland* on the evening in question and to its position at successive times.

The Government testimony is to the following effect: The *Mayflower* was on blockade duty off Havana, and on the night of July 19 was covering about five points of the compass on bearings from the Morro, ranging from S. SW. to SE. by S. and back again. When she was N. by E. of the Morro light, about 8.30 p. m., a faint light like a plain lantern without any lens and not shining steadily was reported N. by W. from 2 to 3 miles away, the *Mayflower* then lying about 7 miles from the Morro, which bore a little W. of S. The *Mayflower* immediately stood for the light at full steam and under forced draft, going soon at the rate of 16 knots. She stood on about N. by W. or N. NW. (pp. 50, 67), lost the light and picked it up again several times, now on the port and again on the starboard beam, the night not being dark. During the chase no light but the faint one was seen on the *Newfoundland* (p. 50), not even the masthead light (p. 53).

It seems that besides the regular lights it is very unusual in ordinary times for a ship not to show stray lights—lights through the air ports, the cabin, and other places (id.). The running lights should have been sighted before the chase if the *Newfoundland* had pursued a direct course after being warned by the *Tecumseh*. (See also pp. 60, 64, 65 for the certainty of the officers of the *Mayflower* about the absence of lights.) The prize was overhauled at 10 p. m., and brought to promptly when the blank charge was fired. The *Newfoundland's* position at 8.30, by her log, and the *Mayflower's* position at the same time, relative to the Morro, agreed almost exactly, the former giving it as north of the Morro, and the latter N. ½ W., the *Newfoundland* log reading (p. 64), "8.30, Havana light bearing S. 10 miles." From 5.30 p. m., when boarded by the *Tecumseh* (or 6 p. m., according to the *Newfoundland's* time), to 8.30, when sighted by the *Mayflower*, the *Newfoundland* only made 12 miles, even if she is given the benefit of the farthest point of the circle which the *Tecumseh* was covering as her starting point, or about 5 miles if the *Tecumseh's* nearest point is taken; and the *Tecumseh* boarded the *Newfoundland* not more than 9 or 10 miles from the place where the *Newfoundland* was sighted by the *Mayflower* (p. 57); whereas at her rate of speed (8 knots) the *Newfoundland's* run should have been, in the three hours, 24 miles (p. 52); or, taking 6 o'clock as the time of the *Tecumseh's* boarding, in the two hours and a half, 20 miles (p. 57). She was near enough shore when sighted and when boarded to have seen the Morro lights and signals (p. 52).

It seems that while the Crooked Island passage is not the nearest route from Halifax to Kingston, it is the best, because the best lighted; but the distance from Sagua la Grande to Kingston around the west end of Cuba rather than returning on the course and going by way of Cape Maysi is 240 miles farther than by the latter route (pp. 54, 55).

The foregoing account is chiefly from Captain Mackenzie's testimony. The other officers of the *Mayflower* examined, Lieutenant Culver, navigating officer (p. 66), and Ensign Pratt, watch officer (p. 72), make this testimony cumulative and confirm it by various additions. As to the lights, Lieutenant Culver says that the light by which the *Newfoundland* was first sighted was very dim; that about twenty minutes of 10 the hull was sighted, but at that time no lights had shown at all except the dim one; that in heaving to, and as the *Mayflower* ran up on the *Newfoundland's* beam, all her regular running lights showed suddenly (p. 67); and Ensign Pratt, who was the prize master (p. 73), says the only light which showed was not a regular running light, and from the latter's testimony (p. 74) apparently the light which originally showed was a lantern hanging in the companion way of the after-deck house, which to be seen from another vessel would require the latter to come pretty nearly abeam, and if the lantern were seen, the regulation running lights on the masthead and sides would also be seen if lighted.

As to the distance of the *Newfoundland* from the Morro when captured, Captain McKenzie thinks (p. 64) that she

was a little farther off than 17½ miles, and not so far as 21 miles; and that, as to her distance from Havana light at 8.30 p. m., if 17½ miles is correct, her course from 8.30 (when, on the contrary, Havana light was, according to the log, 10 miles due south) would have been about due west—if 17½ and not 21 miles was the correct distance from the Morro at the point of capture; and the course would have been NW. by N. if 10 miles from Havana at 8.30 and 21 at capture are right (p. 66). Lieutenant Culver, upon returning to the *Mayflower* after boarding, took the bearings of Morro, found Morro to lie SE. by E., and estimated the distance to be between 17 and 19 miles (p. 68). Both the captain (p. 56) and Ensign Pratt (pp. 75, 131) testified that on the *Mayflower's* station there was not much current, or practically no current, and that the currents (so far as there were any) were variable. Ensign Pratt had fixed the position of the *Mayflower* at 8.30 p. m. by taking bow and beam bearings on the Morro, which were true within a quarter to half a mile, and showed that no time allowance for drift was necessary, because he was in the act of taking the bearings when the *Newfoundland's* light was sighted (p. 75). On pages 75–7 Ensign Pratt testifies to the successive changes of course run by the *Mayflower* in picking up the light of the *Newfoundland*. See also *Mayflower* log (p. 133).

The claimants' chart before the court, upon which these various positions, bearings, and courses were plotted, was supplied with data made by Lieutenant Culver on the forenoon of July 20, on bearings taken by himself locating the *Newfoundland* at the time her light was sighted

and at the time she was overhauled, with an approximation of the courses of the intermediate chase, on which is indicated in dotted lines the position of the *Tecumseh* given by her commanding officer (pp. 70–1, 134–5). A reproduction of this chart, as above stated, is inserted at the beginning of this brief, as well as of Lieutenant Culver's diagram.

Lieutenant Evans, commanding the *Tecumseh*, and Executive Officer Nickerson, of that vessel, testify (pp. 78, 83) that the *Tecumseh* was steaming on the Havana station, Morro light bearing from SW. by S. to SW. by W., and at the time the *Newfoundland* was sighted was about 6 to 8 miles to the north and east of Havana and about 3½ miles from the nearest shore, with the Morro light bearing at that time about SW. The *Newfoundland* was sighted by the *Tecumseh* proceeding under sail about 5 p. m., July 19, and the *Tecumseh* took her to be a schooner. At this time the latter's position relative to the Morro and to the *Tecumseh* was northward and east, and after a run of about half an hour, say 4 miles or a little over, in chase, the *Tecumseh's* speed capacity being 9 to 10 knots, the executive officer went on board the *Newfoundland* to examine and report. The *Newfoundland's* distance from the *Tecumseh* when sighted was about 9 miles away, north and east, and her course was west or a little south of west. The executive officer boarded at 5.35 p. m. exactly, found the *Newfoundland's* papers noted by the *Hudson* and *Badger*, and thereupon he indorsed the papers also and warned the captain if he wished to avoid trouble to keep to the north of west, and then returned to the *Tecumseh* at 5.50. Lieutenant Evans estimated the *Newfoundland's*

location when boarded apparently from bearings taken previously, and, allowing for the current set, by latitude and longitude, and both officers found this position to be unquestionably within the large dotted circle on the tracing (see frontispiece), and while not assuming to fix the position closer than within 3 miles, they say it was about the center of the circle. After the warning to the *Newfoundland* to go north of west, she proceeded in that direction, apparently standing on one or two points to the north of west. An extract from the log of the *Tecumseh* from 4 to 8 o'clock on the day in question is given on page 81 of the record.

The claimants' testimony was, that off Nuevitas the vessel was stopped by the *Badger*, and the register indorsed to the effect that her papers were regular, and the information given that the entire Cuban coast was blockaded (pp. 86–7, 127). They then passed Caibarien and Sagua, steering about due west without attempting to enter, and, still proceeding west, were stopped on the morning of the 19th by the *Hudson*, whose mate examined the papers, but made no memorandum, and then were spoken and brought to by the *Tecumseh* at 6.10 p. m. on the same day. The average rate of speed during the entire passage through Crooked Island passage and the Bahama Channel was 7 to 8 knots, following the channel and the line of the Cuban coast, and generally on a westerly course, without material divergence. At the meeting with the *Tecumseh* they were 14 miles offshore, and then steered one point north of west until 8 p. m. for about an hour and a half, when they returned to west, being then north of eastward of Havana light (pp. 89–93, 115, 124).

They proceeded then on the westerly course, and just before Havana light dipped at 10 p. m., distant 21 miles the bearing was observed to be N. NW. ½ W., a few minutes before the *Mayflower* dropped her searchlight and fired her gun. Up to that time the *Mayflower* had not been observed from the *Newfoundland* at all (pp. 93–4, 107, 122). The witnesses all testified that the regular lights were burning as usual (pp. 87, 98, 105, 115–6, 122–4), except the chief engineer, who was not in the habit of noticing the lights (p. 129).

The captain testified that Canadian customs authorities ordinarily grant separate clearances as well as manifests for more than one port, but this appears to refer to domestic clearances of subsidized mail boats from Halifax to other Dominion ports, and he says, doubtless inadvertently, that "they used to have a separate clearance *from* every port they were going to" (92, 93, 102). He also testified that the Havana light is a 21-mile light from the usual elevations, according to the Norrie and Wilson Sailing Directions and Chart, standard authorities throughout England and Canada (p. 94). He explained his failure to turn back for Cape Maysi when warned by the *Badger* off Nuevitas by saying that he felt it would be suspicious to turn around, and he wanted to satisfy the owners and charterers by passing Caibarien and Sagua la Grande. For the same reason—that is, to avoid suspicion—he did not show the charter party to the *Badger's* officer and the other boarding officers, and concealed the fact that his cargo was destined for Cuba (pp. 103, 104, 106). This explanation did not seem to satisfy the prize court (colloquy on pp. 110–11).

As to the position of the *Newfoundland* when boarded by the *Tecumseh* at 5.30 p. m. and when overhauled by the *Mayflower*, and as to her courses and distances, the master says they were 14 miles off the nearest shore when the *Tecumseh* boarded (p. 91); the chief mate says 13 or 14 miles, and that they could not see Havana light-house; and the helmsman says, "a long way off land" (pp. 115, 117, 124). All the claimant's witnesses who testify on the point, say they were boarded by the *Tecumseh* at 6.10 p. m., and proceeded at 6.30, changing the course then from west to west by north, and continued on that course until 8 o'clock, when they came back to west, thence continuing on the latter course until captured (pp. 89, 91, 92, 115, 116, 118, 122, 124). The log kept by the chief mate (pp. 64, 114, 118) shows at 8.30 p. m. that they passed Havana entrance, bearing south 10 miles; but he testifies that he first saw the light shortly before eight, a point before the beam south by west (p. 119); that he only guessed the distance when passing, and he nevertheless made the light to be 15 or 16 miles distant at that time, which distance he revised to 16 or 17 miles (p. 118), his log statement being based on "a rough calculation" in which he "gave the ship the benefit of the doubt" (p. 114); and by this he seems to mean that while he knew the ship was farther away than 10 miles, and he did not therefore put down in the log the best knowledge of the ship's position which he then had, nevertheless, not having correct bearings, he merely noted the position roughly and gave the ship the benefit of the doubt, as an error on the side of safety, by putting her nearer shore than she really was (pp. 114, 118, 121).

The position on the captain's chart similarly varies, placing the ship 17½ miles off Havana when they passed the light (p. 92). He is not sure, however, that all the positions were noted on the chart before capture (p. 107). Proceeding due west after 8 o'clock until 10 (pp. 92, 98, 116, 122, 124), about five minutes before capture the captain noticed the *Newfoundland's* position on his chart (pp. 107, 109). When he went on the bridge after the *Mayflower* fired her gun he had to stand on the bridge seat to see Havana light (p. 107); and the chief mate did not see it until he reached the compass pole, 15 feet above the bridge. It was bearing then SE. by S. ½ S. (p. 119) and 21 miles distant; but this is estimated because from the course steered this should have been the position of the ship; he knew he "was no nearer the light than 21 miles," because he took the bearings from the bridge just as the light was dipping, and because of the statements in the Norrie & Wilson publications (pp. 93–95). From 6 o'clock to the capture at 10 they had logged about 7¾ miles an hour and traveled 27½ miles (p. 98). Three hours later—that is, about 1 o'clock a. m. on the 20th—they set out for Charleston (pp. 109, 114, 132). Mr. Pratt and the captain agreed to split the difference as to distance, and fixed it at 18 miles (pp. 108, 132). Lieutenant Pratt, recalled (p. 131), says the captain placed the distance from Morro at 19 miles [not 21] and he himself at 17, and so the agreement was made at 18 in order to find a fixed point in laying the course to Charleston. The point of departure has been rubbed out from the chart, but is now indicated by pencil dot, and Mr. Pratt says that nothing occurred showing an

error in his original point of departure. Mr. Pratt thinks the light bore S.SE., but is willing to grant that it may have been S.SE. ½ E. (p. 132). He says that the drift, if anything, between capture and setting out for Charleston was farther out to sea, and that the Havana light was visible from the deck. The captain, being recalled, thinks the current was a little the other way (p. 133.) The captain also says here that he is not positive as to the distance of the agreed on position from Morro, but is as to the bearing. As to the visibility of the light, see testimony of Captain Mackenzie (p. 58), Lieutenant Culver (p. 68), Captain Malcolm (pp. 94, 107), Salkus (pp. 115, 117, 119), Lieutenant Pratt (p. 131), and *post* as to standard authorities.

The engineer of the *Newfoundland* testified as to a stoppage for daylight at the entrance of the Bahama Channel in the early morning of July 18; that they were steaming easy to save coal, and he showed an entry in his log on July 19, viz: "Owing to blockade we continued course to westward to Jamaica for coal," which was made on a statement of Captain Malcolm some time on that day (pp. 127–8). Nevertheless, they reached Charleston under full speed with about 80 tons of coal in the bunkers, and burned on the way from 15 to 16 tons per day, as against 17 in the early part of the voyage, and 12 in the days just before the capture (p. 129). An entry in the engineer's log at 4 p. m. on July 18, as they were passing the entrance to Caibarien, shows that they were "running slow," and from 5.15 to 9.25 at increased speed. This was, the captain says, to ease him

in his position by seeing the Key Francis light lit (p. 130).

After hearing, upon the additional proof, the court, by opinion filed September 12, 1898 (pp. 135–145), condemned both ship and cargo, and the claimants thereupon took this appeal, filing assignments of error, as shown at pages 153–155.

ARGUMENT.

We will consider first the exceptions and other preliminary objections of the appellants raised by the assignments of error, and then the question on the merits.

I.

PRELIMINARY OBJECTIONS.

The introductory question raised by the answers to the amended libel, the exceptions, and the assignments of error is that the bare allegation of the amended libel as to the seizure and that the vessel and cargo are lawful prize, striking out the words "in attempting to violate the blockade," etc., in the original libel (1, 8, 15, 16), is vague and uncertain and can not be met, and is wholly insufficient in law as stating a mere legal conclusion (18, 20, 153–4). But it is obvious that the amendment to the libel was made because the facts do not show the usual positive and direct attempt to violate the blockade, and the seizure in the act, so to speak, as is often or customarily the case, but the form of attempt at breach known as "loitering"—the course of preparations for breach which shows an intention to violate the blockade,

and the mere waiting about until an opportunity is found to do so with safety.

The Government then went on and showed by clear and preponderating evidence that the circumstances constituted a case of "loitering" with intent to violate the blockade. The opinion of the court shows that the proof on this point was complete and convincing, so much so, in fact, that the court was compelled to assent to it, perhaps reluctantly.

We therefore contend that the circumstances made the amendment of the libel necessary, and that the proof thereof exactly corresponded to the language and justified it, and that the objections of the answers, the exceptions, and the assignments of error on this point consequently fall.

Overt acts of an attempted breach, except so far as they reside in the course of acts and procedure which constitute loitering, did not necessarily exist and could not be properly alleged; and if they did exist, they would be developed and could be shown upon taking the evidence, and the amended language is therefore entirely accurate and proper.

The court below, in its opinion of August 17, cites authorities for the proposition that the accepted form of libel in prize causes states the prize capture in general terms, and the amendment to the libel intimated by the court's opinion to be necessary was properly allowable and allowed.

Upon this point we quote from Justice Story (Notes on the Principles and Practice of Prize Courts, p. 49):

> In prize causes it is not usual to file any special allegation of the peculiar circumstances on which

> the captors found their title to condemnation. The libel is and always ought to be the mere general allegation of prize such as is used in undoubted cases of hostile property. The act of bringing the vessel in and proceeding against her alleges her generally to be a subject of prize rights; and the captors are not called upon to state at the commencement of the suit the particular grounds upon which they contend she is so. They have a right to institute the inquiry and take the chance of the benefit of any fact that may be produced in the course of that inquiry. (Citing *The Adeline*, 9 Cr., 244; *The Fortuna*, 1 Dods., 81.)

As to the objection that further proof should not have been allowed, this proceeding rests in the sound discretion of the prize court. "The court is in no case concluded by the original evidence, but may order further proof on a doubt arising from any source or quarter; and it will sometimes direct it where suspicion is produced by extrinsic evidence. * * * The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and the answers to the standing interrogatories. * * * But further proof is in no case a matter of right, and rests in the sound discretion of the court." (Pratt's edition Story's Principles and Practice, etc., p. 24, and auth. cit.)

In the case of the *Sir William Peel* (5 Wall., 534) the chief justice shows that further proof may be ordered by the court of its own accord.

And in fact, in this case, while we contend that further proof was properly allowed to the captors, it might very forcibly be contended that the same indulgence

should not have been granted to the claimants, because they were thereby given an opportunity, after the pressure of the cause was known, to qualify, explain, and vary the testimony shown *in preparatorio* and upon the ship's papers, which is contrary to a well-established rule of evidence in prize law.

II.

THE MERITS.

1. *As to the facts.*

The Government submits at the outset the general circumstances and atmosphere of suspicion about this vessel. She was a sealer, not engaged in the West India trade before the Spanish war. She had been stopped and turned back at Guantanamo in June, where she showed a disposition to proceed in disregard of warnings (Rec., pp. 27, 31), and she was then under the command of the claimant and managing owner here, as to whose identity Captain Malcolm is rather secretive and vague (pp. 31, 83), as he also is about the letter of instructions from the charterers addressed to Captain Farquhar and shown to Captain Malcolm, but not left in his custody (pp. 30, 32, 85, 105) nor produced on claimants' behalf. A member of the crew not on the earlier trip had heard the common report at Halifax of the attempt to enter at Guantanamo (p. 48), but a member who was on that trip makes no mention of it in reply to the same interrogatory (p. 43), and the engineer, who was also serving then, is similarly reticent (p. 129).

The vessel proceeds from Halifax cleared for an alternative destination, an unusual clearance which seems to be customarily allowed under Canadian regulations when a vessel clears domestic as a subsidized mail boat, proceeding to other domestic ports; but this was a foreign clearance. Granting that the more westerly course through the Crooked Island passage was better and safer than the more direct course, even if the master was going around Cape Maysi to Jamaica, at Nuevitas he is distinctly warned of the blockade *de facto* of the north Cuban coast, which was then supposed to exist outside of the proclaimed limits, and knowing, or thinking at least, that he could not safely enter Caibarien or Sagua, and stating that he did not intend to enter, here he should have returned for the much shorter eastern run to Kingston. But, holding in reserve the alternative destination to Vera Cruz (the variation regarding which will be referred to later), he proceeds west, stops for forty minutes for daylight at the entrance to Bahama Channel, although it seems to be well lighted on both sides, and runs slow for an hour and a quarter as he is passing the entrance to Caibarien. This was about 4 o'clock p. m. on July 18. There appears to be nothing in the facts or evidence as to the vessel's conduct on passing Sagua, for the next knowledge of her is when she was boarded by the *Hudson* about 11.30 a. m., July 19.

The commercial motive of the voyage is of course obvious, and while, notwithstanding, humanitarians may not see a very heinous offense in the proposal to land food in Cuba, prize law can not admit that reasoning; especially not in relation to blockade, which, however

war may be otherwise softened, is meaningless unless strict and rigorous. Therefore, if the vessel is subject to condemnation, the cargo is hopelessly tainted. The voyage was made for the cargo; the ship is neutral as well as the cargo, and the case does not at all resemble an innocent neutral cargo on an enemy's ship. The offense must be kept in mind, and that is the attempt to violate the blockade, not, it appears, by open sailing for an interdicted port, but by motive, purpose, intent, preparation, and the attempt to enter, shown *per se* by the "loitering." This sort of proceeding is the gist of blockade running, which, whatever the immediate facts at capture, essentially consists of covert elusion and of waiting for opportunity. So much for the initial considerations.

Here it is well to refer to a statement of the court below, that, as Caibarien and Sagua were not included in the proclaimed blockade, the *Newfoundland* might safely and openly have proceeded to either of those ports with a frank avowal of the real destination and an exhibition of the charter party. The master did not seem to think so, however.

Now, there was considerable uncertainty, until the United States was well launched in the Spanish war, on the question whether the north Cuban coast blockade did or did not extend as a blockade *de facto* beyond the limits of the blockade of Havana and the ports and coast between Cardenas and Bahia Honda proclaimed on April 22, 1898. A memorandum of the Navy Department, dated March 23, 1898, contemplates the possibility of a more extensive blockade than the western half of the

island, and says that off much of the coast and off the smaller harbors a single vessel cruising to and fro may be all that is needed, and then suggests that off important ports, and notably off Havana, there should be three lines of blockade. (Appendix to Report of Chief of Bureau of Navigation, pp. 164, 171.) The commodore commanding the north Cuban blockade evidently thought even as late as July 17 that the blockade as established in fact, with that proclaimed, included the entire north coast (id., 256, 260), and until advised to the contrary by the Navy Department on August 8 and 9, that he had been authorized to blockade the north coast of Cuba, and that he had established and maintained an efficient blockade there especially in reference to Sagua la Grande. (Id., 296, 298.)

There was therefore at the time this vessel was seized near Havana, and when she was passing along the Cuban coast and ports farther to the east, abundant justification for the view of the various commanders to the east of Havana that the service they were performing was blockading service as well as scout and cruising service.

The master, at all events, thought, as the officers of the *Badger* thought, that there was a blockade at Sagua and Caibarien, and therefore it is not quite true that the master might well have gone to either of these ports for the purpose of testing the validity of the supposed blockade, which the court below appears to think (p. 143); at least, by so going he would have shown quite fatally his conjoint intention to break the blockade at Havana by endeavoring to break or test the validity of the blockade

which he supposed to exist at Sagua and Caibarien. In cases where vessels entering or issuing from ports not proclaimed but supposed to be blockaded, Sagua la Grande among them, were released, entire ignorance of the supposed blockade was shown. The argument on this suggestion in court, therefore, as bearing upon the master's intention embracing all three ports, one of which was and the other two of which he thought were blockaded, may proceed as if the conception of the naval commanders in that vicinity at the time was correct and Sagua and Caibarien were in fact blockaded. There was due notification to the master, in fact, and the only purpose of a proclamation is to notify. (*The Neptunus*, 1 Rob., 170.) Nor may a master just warned, within a short run of the points in question (to be measured by hours), assume discontinuance and allege proceeding to find out. This amounts to an intention to test the effectiveness, and may not be permitted. He has been warned and proceeds at his peril. "The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river and say, 'If you do not meet with the blockading force, enter; if you do, ask a warning and proceed elsewhere.'" (*The Spes and Irene*, 5 Rob., 76, 80.)

Those in charge of the *Newfoundland* thought before they proceeded from Nuevitas that the ports (Caibarien and Sagua) were blockaded, and they also knew that they had no reason to suppose the blockade would be raised before their arrival. (*The Admiral*, 3 Wall., 603, 616.)

Now, we contend by the foregoing that in reference to Captain Malcolm's belief that Sagua and Caibarien were

blockaded, and that he could not enter, his delays in passing along that part of the coast, as well as the specific loitering before Havana, for which particularly the vessel was condemned, show his general intention to break through the blockading line wherever he could and land his cargo.

The underlying inquiry as to how far a belligerent's blockade lines may interfere with a legitimate commercial voyage is now involved, and, assuming for argument's sake that the master was proceeding past, and not to, Caibarien and Sagua (though not for any conceivable reason, if he was going to Jamaica), let us consider the testimony as to destination.

The court below shows forcibly from the alternative clearance, the curious condition of the blanks for destination on the engineer's log, and from the testimony, how doubtful and vague that question was (Rec., pp. 143–4). In fact, the testimony is permeated with ignorance, disingenuousness, and ambiguous understandings on the subject. Beside the instances cited by the court and passages in the depositions *in preparatorio* (pp. 24, 28, 34, 36, 37, 42, 48) there are the following examples: The captain says "Kingston" (pp. 24, 28); he told Mr. Pratt "Vera Cruz" (p. 75); he says he didn't have coal enough to go to Kingston and Vera Cruz, and that as things turned out he was going to Kingston (p. 104); the engineer, on July 19, entered Kingston as the destination on his log on a statement from the captain; his previous log headings had been Vera Cruz and Kingston. The chief mate's attitude on the question is exactly the reverse of this—he changed his log heading, previously

"Kingston and Vera Cruz," to "Vera Cruz and Kingston" on the morning of the capture. He says that Vera Cruz was their destination; that they were bound first to Vera Cruz as the first port of call to his knowledge. This he emphasizes, saying he must have made a mistake when he put it down Kingston and Vera Cruz (pp. 119–20).

It is fair to admit that a double clearance, although unusual under our own navigation laws, would not necessarily be suspicious; but the double clearance here becomes suspicious, in connection with the other circumstances, because neither port was the primary destination, and the voyage on all the facts hardly looks legitimate in regarding the rights of *bona fide* neutrals relative to a blockade. Furthermore, the conclusion is irresistible that the captain's final determination (after he knew that he was thwarted) to go to Kingston rather than to Vera Cruz was based upon the fact that from the former port his chances for landing his cargo at some Cuban port were greater. Vera Cruz is the more distant point on the natural courses to the two ports all the way on his voyage up to a point about 35 miles east of Havana, for, according to the Hydrographic Office, the distance from Havana to Vera Cruz and to Kingston, by way of Cape Antonio, is 810 miles, and 740 miles, respectively.

We now come to the facts from the *Tecumseh's* boarding up to capture. The difference in time of about half an hour from the testimony of the *Tecumseh* and from the *Newfoundland*, respectively, may possibly be explained by the fact that the *Newfoundland* may still have been running on Halifax time or thereabouts, although this is not

likely, for nautical reasons; and because the *Newfoundland* and the *Mayflower* are substantially agreed as to the time of capture and subsequent events, and any difference then indicated is the other way; that is, makes the *Newfoundland's* time slower than the *Mayflower's* instead of faster, as it is said to be faster than the *Tecumseh's* about 6 o'clock. Now, it is most unlikely that vessels of the same blockading squadron, posted near each other would vary half an hour in the time on board. These circumstances, and the rule that the probability of a disputed fact must be taken against the side which has an interest or the greater interest, place the preponderance of the evidence in favor of the *Tecumseh's* story as to time. Similarly, the preponderance of evidence shows that the position of the *Tecumseh*, 6 or 7 miles about northeast of Morro, and $3\frac{1}{2}$ miles from the nearest shore when the *Newfoundland* was sighted 9 miles away to the north and east, with a run of $4\frac{1}{2}$ miles due north in chase, fixes the position of the *Newfoundland* when boarded by the former about 8 miles from the land, the Morro then bearing a little west of southwest, instead of 14 miles as the *Newfoundland's* master (p. 91) and chief mate (p. 117) testify, and unquestionably within and probably near the center of the chart circle, which is $10\frac{3}{4}$ miles from Morro bearing S. W. $\frac{1}{2}$ W. instead of at a point 24 miles from the Morro, $13\frac{1}{2}$ miles from the center of the circle and $10\frac{1}{2}$ miles from the point of the circle nearest the *Newfoundland* as fixed by the captain and the mate. As to the degree of daylight, Lieutenant Culver says that it was twilight on the evening in question at 7 o'clock, and at half-past seven it was pitch dark (p. 72).

This is confirmed by the chief mate, who says (p. 115) that sunset was 6.38, and that it was a clear night. He also says that they could not see Havana light-house (p. 117) either with or without glasses. Now, on the claimants' own statements of their position then and of the conditions and visibility of Morro light, they must have been able to see the castle or the light from the point of the *Tecumseh's* boarding, either as a daylight mark of 144 feet above the sea, or as a night light. Now, from this point the *Newfoundland* deflected from her westerly course by about one point north, and this is confirmation of the log statement that at 8.30, passing Havana entrance the light bore south 10 miles, if such confirmation is needed against the inconsistent statements of the master and mate that notwithstanding the log the light was farther away, about 17 miles. Here again the argument based on interest counts against the weight and credibility of the ship's testimony, and the log record telling against the party making it must be accepted as verity.

About this point and time the *Mayflower's* chase began, and when it ended, at 10 o'clock, at a point stated by the *Mayflower* witnesses to be 17 miles and by the *Newfoundland* witnesses to be 21 miles, and afterwards agreed upon by Mr. Pratt and Captain Malcolm to be 18 miles, about NW. by N. of the Morro, the captain said that they had gone in the three and one-half hours (according to his time) 27½ miles—that is, 8 miles an hour. The time was, however, four hours, and they should have gone 32 miles unless they lagged. The distance, as a matter of fact, from the boarding point of the *Tecumseh* to the point of cap-

ture is only 18 miles; and as to the performance of the *Newfoundland* from 8.30 until capture, the astonishment of Captain Mackenzie, when told her rate of speed and her due westerly course, is convincingly obvious from the colloquy reported by Captain Malcolm (pp. 99–100), because the *Mayflower* had been chasing at a rate of from 11 to 16 knots. Either the *Newfoundland's* rate was greater than stated, or her lights were out and she was zigzagging. As to the course, it is just possible, as stated by Captain Mackenzie, that the *Mayflower* alone, and not the *Newfoundland*, was repeatedly changing her course; but this does not appear very likely from the *Mayflower's* log (p. 133) and the account of Watch Officer Pratt (pp. 75–77), and from the latter's evident vigilance, and Captain Mackenzie's statement that it is possible, adds that it can not be reconciled with steering a west course (p. 62.) The *Mayflower* constantly lost the light, and the captain says if the *Newfoundland* were going west they must have seen it, but if west by north, that is just on the verge of losing the light (p. 66); and Ensign Pratt says that if the *Newfoundland* was heading west and the *Mayflower* running N. NW., as she did, shifting gradually around to NW., he would just be getting within range of her light, and that if she was heading west her masthead light should have been visible anywhere from W. to S. SE., and that she was bearing when picked up N. by W., the reciprocal bearing being S. by E., and that consequently he would then have seen the light, because being then one point on its visibility. If she was heading west when the slight light was picked up, her lights would have

been visible all the way from W. to S. SE., and she having come from the east, steering a west course, he could of course have seen the masthead light before (pp. 76, 78).

It is thus seen from the chart that the *Newfoundland* had only sailed 18 miles when she ought to have sailed 32 miles, and there are 14 miles, or, at her rate of speed, about two hours of time to account for. Even if the time of departure from the *Tecumseh* is fixed at 6.30 and the *Newfoundland's* rate of speed at a fraction under 8, her captain says she had gone on a W. by N. course up to 8 and on a west course thereafter $27\frac{1}{2}$ miles, and that would have taken her many miles west of the point where she was overhauled. It is therefore necessary to conclude that she loitered on the way, awaiting an opportunity to slip into Havana, and the conclusion of the court (who, it is to be remembered, heard the witnesses and observed their bearing) that the vessel approached near enough to Havana to render it easy to elude the blockade, and tarried there sufficiently long to learn whether she could do so with safety, is not only justified but compelled by the evidence, which shows, as the court found and as we think we have demonstrated, that her presence there was not consistent with innocent intent. She approached "in the night time so near to [the] blockaded port as to be able to see signals from the shore and to watch for the opportunity of entering if it should appear that the coast [was] clear or the vigilance of the belligerent cruisers * * * for the time relaxed. A ship so approaching lays herself under the unavoidable imputation of being engaged in an attempt to break the blockade, and there is a necessary presumption of sinister

motive, which must be rebutted by positive proof that her presence there is innocent; that she is there either from some necessity or in the course of a voyage which requires her to pass that way" (opinion court below, Rec., p. 144). Now, the vessel did not bring positive proof rebutting this presumption; she failed to sustain by adequate proof the denial that she was there, and did not give a satisfactory account of her being in that neighborhood at all (pp. 144, 145).

As to the absence of lights on the *Newfoundland*, it is of course possible that the *Mayflower* would not see those lights until on their crossing the courses they ran far enough up on the *Newfoundland's* beam to get within the range of visibility, and therefore the *Newfoundland's* lights might have been duly burning all the time and not only have suddenly appeared just before the boarding. But it is certainly strange that the faint light was constantly picked up, being apparently in a position (hanging inside the after-deck-house door) where the range of visibility was at least not greater than that of the regulation masthead and side lights. As to the visibility of the Havana light, by the chart it is laid down at 18 miles (p. 68), 15 feet above the water level, so that it would have been dipping, as the captain says, from the *Newfoundland's* bridge at that distance, which is about the distance claimed by the officers of the *Mayflower*. Lieutenant Culver testifies (id.) that it would be visible from the eye 25 feet above the sea 21 miles—that is, from the bridge of the *Mayflower;* but he says that the *Mayflower* was rather high out of the water, and that he thinks the bridge of the *Newfoundland* is probably lower than the

bridge of the *Mayflower*. He did not go on the *Newfoundland's* bridge; in fact, he does not know that she had a bridge, although probably some sort of a place over the deck house. He did not go on it (id.). Captain McKenzie says (p. 58) that the light is an 18-mile light, and claimant's counsel admits that this is the visibility at 15 feet elevation from the sea. Now, this elevation appears to be approximately the elevation of the *Newfoundland's* bridge, being lower than that of the *Mayflower*.

Relative to the facts on this subject as they may be found in the Sailing Directions and Charts of Norrie & Wilson, these and like publications of other private firms, although they may contain much information useful to mariners, are not considered governmental standards of authority. The range of visibility of the Havana-Morro Castle light is given by the Hydrographic Office Light List, Part 1, 1899, the British Admiralty Light List, Part 8, 1899, and the last edition of the Spanish Light List, 1893, as 18 miles from the height of the eye of the observer 15 feet above the water. All of the above-mentioned publications are standard authorities. This is positive confirmation of the Government statement as to the distance of the point of seizure from Morro, viz, 17½ or 18 miles.

The claimants, asserting this seizure to have been a gross marine trespass, rely greatly upon Captain Mackenzie's sending the vessel in merely on suspicions derived from our consular authorities at Halifax, and the captain's own statements to this effect; but he says (p. 56) that he would not have sent the ship in if she had not been spoken by the *Tecumseh* and had shown her running

lights. His duty demanded that he should board her, and having boarded and found the previous warnings, he would have been derelict under the circumstances if he had not sent her in; and Lieutenant Culver says (p. 67) that the cargo invoices, the log statements of the *Tecumseh's* boarding, the omission of course or speed from the log after 5 p. m. on that day, the separate clearances, the captain's vagueness in his replies as to his destination, saying, finally, that he had not made up his mind yet whether to shape his course by way of Cape San Antonio, were the suspicions presented to him. Of course they were positive and ample and justified the prize voyage.

Finally, as to the facts, it must be remembered, in Captain Mackenzie's language (p. 63), that "you don't always catch the person right in the act on a dark night. If he is actually running the blockade, and can put up a good gait, nothing will stop him unless he is afraid of a little gunpowder."

2. *The authorities.*

The court below, while compelled to condemn on the preponderance of evidence as to loitering, notwithstanding certain meritorious or ethical considerations which the court found in the case, thinks that the facts fall short of those in certain famous judgments of Sir William Scott on loitering, as to which it is stated that the vessels were actually heading for the forbidden ports, a circumstance which appears to be absent in this case; but it must be observed that in the dark chase previous to capture, if the navy story showing that the *Newfoundland* was not holding a straight westerly course be true,

as we contend it is, she may well have been heading for the forbidden port in numerous attempts to run in on her successive changes of course, until successively overreached by the unconscious *Mayflower* losing the light and running up on her beam, and thus compelled to head offshore again.

It is true that in the *Charlotte Christine* Case (6 Rob., 101) the vessel continued to approach the shore after she had been hailed by the captors, and had refused to bring to after the first notice; also in *The Apollo* Case (5 Rob., 286, 289–290), the vessel was headed toward Dieppe, but the underlying principles are not necessarily dependent on this circumstance, as is shown by the following quotations:

> * * * The master had stated * * * that he was actually sailing for Caen and had no intention of breaking the blockade of Havre.

The court then refers to the circumstance of the approach to shore:

> * * * Whatever the equivocal cause of such a situation may be, a person can not be allowed to approach so near to a blockaded port as to place himself almost within the effectual protection of the shore and with no necessity existing. To allow such an approach would render the whole purpose of blockade perfectly nugatory. (*The Charlotte Christine*, 6 Rob., 103.)
>
> It must be clear and obvious to [the master] that the *neighborhood of the blockaded port* can not be considered as the *fit locus deliberati* for his future plans. If the court was to admit that a master *might lie to* and call a council of his own thoughts or of those of his crew in such a place, the rights of blockade could no longer exist to any purpose. *He*

would stay in all cases until an opportunity offered of slipping into the interdicted port. It would be practically inconsistent with the exercise of this right of war to hold that the blockading force is bound to stay by him and wait for the result of his deliberation in this suspected place. On the contrary, his first duty is obvious, *fuge litus;* that neighborhood is at all events to be avoided. He is bound on the first notice to take himself out of an equivocal situation, and if he obstinately refuses, and neglects to do so, this court will hold, till it is corrected by the judgment of the superior court, that such a conduct will amount to a breach of the blockade and subject the vessel to condemnation. (*The Apollo,* 5 Rob., 289, 290.)

In the *Gute Ewartung* (6 Rob., 182) it was a Lubec ship coming from Oporto with an asserted destination to Caen, captured 20 miles to the northwest of that port and about the same distance from Havre. There it was true that the vessel was steering to Havre, and in this case the vessel was not steering to Havana at the exact moment of capture; but it is to be suggested that in the cited case the vessel must have overrun her port on the course from Oporto and have been coming back from the northwest; because a vessel running from Oporto to Havre and Caen would naturally come in from the southwest, or, at furthest, from the west. That is, the ship in that case was coming back on a long tack, apparently, from a point beyond the forbidden port, while here the vessel had not gotten past and was pursuing various, and, at the end, desperate, short deviations, either to get in or to get away. Under the different modern conditions, the *Newfoundland* could not take such

open risks as were taken in 1805, for with many blockading vessels and swift cruisers running at the rate of 14 to 18 knots a master needs to be more scrupulous and careful and can only risk short variations from the alleged course, and that with a vigilant watch. Greater chances were taken in the days of sailing vessels. The court says:

> In the present instance [comparing it with the *Charlotte Christine* Case] the vessel was at the distance of near 20 miles; but the unfavorable circumstance to which I allude places her in construction of law in the same situation which the other vessel had actually reached, for the master says that the course which he was steering would have carried him directly to Havre, and that he should have continued in that course, though not into the port of Havre; but that he should have gone close under the land and have taken a pilot for Caen. Here, then, we perceive the same intention and in the course of being pursued to the same illegal effect. How can this intention be considered as innocent? It had not been carried so far as in the other case, I acknowledge, but only because the vessel was interrupted before she had arrived at the spot where the other ship was actually taken. It is impossible that any blockade can be maintained if such a practice is allowed. * * * I am of opinion that the master in this case had declared an unlawful purpose, and *was employed in pursuing it to an unlawful act;* and that the ship and cargo must be pronounced subject to condemnation. (6 Rob., 183, 184.)

Now, this vessel was drawing a circle around Havana through or on the edge of the blockade. Because in her loitering she was finally seized on the western edge of

that circle, and not by the *Tecumseh*, before its middle point opposite Havana entrance was reached, when her true character and purpose were unknown, is she, in view of the obvious intention and of all her acts, to be relieved of the penalty? Punishment properly follows upon the principles announced by Sir William Scott quite as justly as if her experiments had proved fatal on the eastward rim of the circle.

In the *Neutralitet* (6 Rob., 30, 35) the court agrees to the position advanced by the captors, that a belligerent need not admit that neutral ships can innocently place themselves in a situation where they may with impunity break the blockade whenever they please.

> If a vessel could, under the pretense of going farther, approach *eg pres* close up to the blockaded port so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold as a presumption *de jure* that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war. (Id.)

The only difference in this case is that here the vessel has performed all of the acts which show the intention and constitute the breach, and not deeming the opportunity favorable, because of the strictness of the blockade and the numerous vessels, has reached a point in the circle of attempt where she may with plausible reason

allege that she was moving away and on her regular commercial course. The latter is shown to have been very vaguely and ambiguously regarded.

The *Mercurius Case* (1 Rob., 80, 82, 84) is a very strong authority in favor of the Government's contention here, because, while the master of the vessel, pretending to be proceeding to Hamburg till he came to the passage into the Zuyder Zee, which he then attempted to enter, either did allege or might have alleged that he was seeking a port in the Zuyder Zee to which the blockade did not extend, the court nevertheless says:

> How far the blockade might extend to all ports in the Zuyder Zee I shall not now inquire, *because I am sufficiently convinced that the intention of this master was to proceed to Amsterdam in defiance of the prohibition, which he distinctly understood.*

So here, whatever the master's right as to Caibarien and Sogua, or whatever the truth concerning his intention as to Kingston and Vera Cruz, his intention to run into Havana in defiance of the prohibition is sufficiently clear.

There is, it is true, in this case a denial of the intent, but the intent sufficiently appears from the evidence, and the case undoubtedly falls under the ban of the judgment in the *Circassian Case* (2 Wall., 151, 152), where the Chief Justice announced for the court "that sailing from a neutral port with intent to enter a blockaded port and with knowledge of the existence of the blockade subjects the vessel, and in most cases its cargo, to capture and condemnation." The court finds this rule sound, and, established with some hesitation when sailing vessels

were the vehicles of ocean commerce, now, when steam and electricity have made nations neighbors and blockade running from neutral ports seems to have been organized as a business and almost raised to a profession, an indispensable rule for the efficient exercise of belligerent rights.

In the case of *The Mentor* (Edw., 207), the exact circumstances in which the vessel was found do not clearly appear, but it does appear that she ostensibly sailed for a permitted port, and that she was found in a suspicious position, or one inconsistent with the alleged destination, and she was condemned. This case is the same, the conflict among the claimants' own witnesses about the destination, the relation of either destination to her previous voyage, and the relation of her final alleged destination to her position when captured, all show that her situation was highly suspicious and her claim of commercial voyage inconsistent therewith.

The underlying theory, apparently, of Sir William Scott's judgments is that blockade lines effectively maintained are a belligerent right which must be scrupulously regarded by commercial adventurers and must be rigidly enforced by prize tribunals; that the right of blockade is an impregnable right and admits of no relaxation; and it may be added that while modern ideas of war are proceeding through a transition to large mitigations of its rigors, no development on this side can affect the blockade side of war, if war is to continue at all. A commercial voyage, in other words, however the rights of neutrals are safeguarded generally, must yield reasonably and

clearly to blockade lines. The only safe rule is Sir William Scott's rule, "shun that neighborhood," and shun it so definitely that there can be no mistake.

In the prize case heard by the court at the last term, that of the *Olinde Rodriguez* (174 U. S., 510), the Government contended for this rule, asserting that inasmuch as the vessel was on a route from Puerto Plata, Santo Domingo, to St. Thomas, Danish West Indies, from which San Juan, Porto Rico, had necessarily been dropped as a port of call, she should have been well off the Porto Rican shore, and that her presence at least 7 miles nearer shore than the safe limit invoked this rule as conclusive cause of condemnation. But in that case the court found such conflict in the evidence as to location and as to the acts indicating intent and attempt to violate the blockade that they held the circumstances, although suspicious, did not require them to condemn the vessel of a friendly nation (p. 535).

The Government here again invokes the same principle, but in relation to new facts, namely, the facts which constitute the dilatory conduct, the lagging and loitering before capture, which require, as we contend, the condemnation of this vessel and the cargo.

We therefore submit, in conclusion, that this condemnation is to be sustained on the facts shown, on the conduct of the vessel and the demeanor of her officers, and on the claimants' own testimony; and that the vessel and cargo are not to be released because of the mere accident that in the vessel's erratic course and in her dilatoriness preparatory to running in under the Morro guns she had

been carried somewhat to the northwest of Havana on the circles she was describing thereabouts.

We respectfully submit that the judgment of condemnation in the prize court should be affirmed as to both vessel and cargo, with costs.

HENRY M. HOYT,
Assistant Attorney-General,
For the United States.

JOSEPH K. MCCAMMON,
JAMES H. HAYDEN,
For the Naval Captors.

No. 156.

Supp. Brf. of Atty. Gen. for Appellees.

Supreme Court U. S.
FILED
NOV 6 1899
JAMES H. MCKENNEY
CLERK

Filed Nov. 6, 1899.

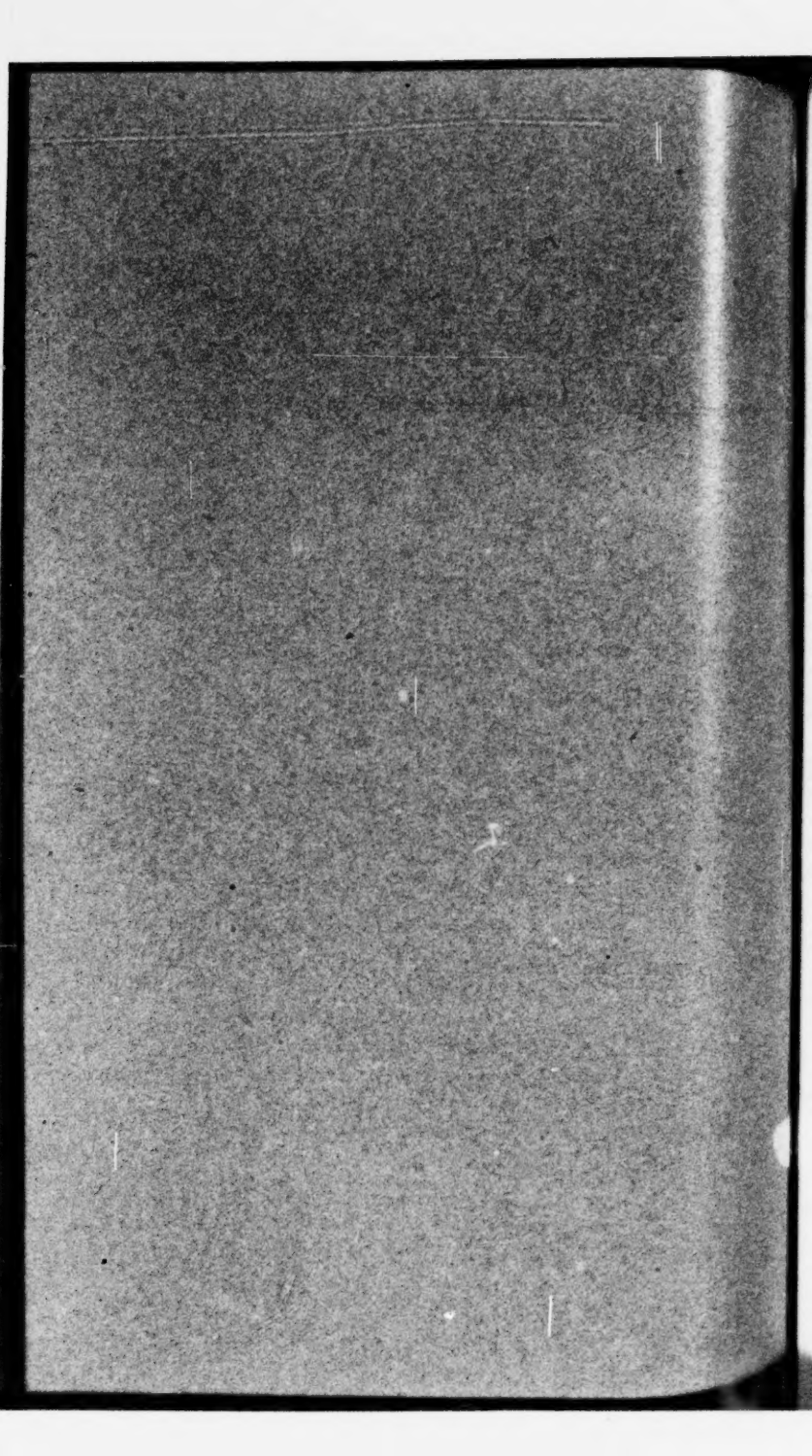
In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JAMES A. FARQUHAR, OWNER AND claimant of the steamship *Newfoundland*, and David Robertson & Co., owners of the cargo of said steamship, appellants,
v.
THE UNITED STATES.
No. 156.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE CAPTORS.



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1. *Further proof.*

Replying to the claimants' brief, it is to be observed that they especially challenge (brief, pp. 11–21) the action of the court below in allowing further proof. The court, however, allowed the claimants as well as the

captors further proof, and the claimants proceeded to take further poof, recalling their witnesses *in preparatorio*. As we point out in the main Government brief, the allowance to the claimants might well have been regarded as improper, because they were thereby permitted to explain and vary their evidence at the first hearing. It is beyond question that the prize court has the discretionary power to order further proof; this the claimant concedes in his brief (p. 14). It is well settled that the court may make the order upon a doubt arising from any source or quarter and upon its own accord. The discretion so exercised here was soundly and legally exercised. The casual reference in the opinion of the court to Commander Mackenzie's merits as an officer and a man had nothing to do with the order. Captain Mackenzie's suspicions were well-founded. They were shown by his action in seizing the vessel, and by the testimony *in preparatorio*—for instance, by the answer of Captain Malcolm to the third interrogatory, in which the information from Halifax that the *Newfoundland* had left that port with the intention of running the Cuban blockade, was obviously only one of several reasons for Captain Mackenzie's suspicions and was specifically joined with the absence of lights and of the alterations of the *Newfoundland's* course. Furthermore, Captain Mackenzie's indorsement on the *Newfoundland's* log, found in the opinion below (Rec., p. 12), while it would not have been sufficient to condemn, and for that purpose would not have been considered on the first hearing, was a source of doubt from which the court might properly draw, confirming, as it did, the master's testimony on that subject. Hence the court, in

saying "it furnishes ground for further proof" (p. 15), was referring not to Captain Mackenzie's character, but to his suspicions and their obvious gravity.

The claimant thinks that the opportunity to explain is usually given only to claimants; but that there is at least a balance between the rights of the two parties in this regard is shown by the quotation from the opinion of the Chief Justice in the *Sir William Peel*, 5 Wall., 534 (brief, p. 14): "If upon this evidence the case is not sufficiently clear to warrant *condemnation* or *restitution*, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof." And Justice Story says, summing up the question on both aspects (Notes on Principles and Practice of Prize Courts, pp. 25, 26), that the privilege may be forfeited by both parties because of fraud or gross misconduct; and that further proof is necessary in all cases "where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence in general induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transactions." * * *

We respectfully submit that in view of the reasonable suspicions and doubts which the facts about the vessel as subsequently developed fully justified, the case was "not sufficiently clear" to warrant restitution, but, on the contrary, required further proof, and if the privilege was properly granted to the claimants at all, it was to enable them to explain circumstances plainly "pregnant with suspicion." All of the cases cited by the appellant in

reference to prize as well as in reference to the general exercise of legal discretion sustain the Government's contention. The hesitation to allow further proof to captors arose where they were casting about for reasons for condemnation—where there was mere suspicion or no just suspicion. That is not this case, and the discretion of the court was exercised not in an arbitrary, vague, and fanciful manner, but legally and regularly. So, in particular, to refer to the judgment of Sir William Scott in *The Haabet* (6 Rob., 54), as cited by the appellants on pages 17 and 18 of their brief, the rule is to take the original evidence of the claimant as conclusive *if not impeached*, and the court there, evidently having before it captors' depositions upon their motion to give their version of the circumstances of capture—that is, the court, not having ordered, as is the fact in this case, further proof of its own accord upon its own doubt or suspicion—remarked that the depositions in that case were "as void of suspicion as any which the court is in the habit of perusing."

The Government therefore claims that the circumstances presented a case of "doubt," one of "strong suspicion," one "pregnant with suspicion," that the case was one "clouded with suspicions or inconsistencies." Upon the evidence *in preparatorio*, it is only necessary to refer to the double clearance, to the illogical reason for passing Sagua and Caibarien after he had been told [although erroneously] that those ports were blockaded (p. 29), and to the uncertainty and disagreement about the destination shown throughout all the testimony *in preparatorio*.

2. *The claim for damages.*

Ordinarily, costs in admiralty follow the decree. The subject of costs as well as a claim for damages is largely in the discretion and judgment of the appellate court. Even on a decree for restitution, the court has repeatedly held, under circumstances showing justifiable conduct on the part of the captors, not only that claimants' costs and expenses were not to be decreed against the captors, but that both costs and expenses were to be decreed against the claimants. (*The Dashing Wave*, 5 Wall., 170; *The Science*, Id., 178, and other cases on following pages; *The Mary*, 9 Cranch, 126; *The Venus*, 5 Wheat., 127; *The London Packet*, Id., 132; *The Springbok*, 5 Wall., 1; *Sir William Peel*, Id., 517; *The Olinde Rodrigues*, 174 U. S., 510.)

A fortiori a claim for damages could only be hopefully addressed to the court where there has been a gross outrage and a palpable marine trespass. Can it be seriously contended that in this case, in which the Government is earnestly pressing for condemnation of both vessel and cargo upon facts which plainly show a violation of the law and under circumstances which at the very threshold cast the gravest doubt and suspicion upon the claimants, a claim for damages may be advanced which the court could seriously entertain? We respectfully submit, in asserting the right of the Government to the penalty of condemnation, that the mere outline of the facts carries the case at once and far beyond the doubtful region of mere probable cause. Consequently the cases which state (brief, p. 23) that restitution must be restitution of

original value, with full damages and costs, have no application, and in *The Watchful* (6 Wall., 93), which is cited on the next page, it was very clear that there was no intention to break the blockade or to trade with the enemy.

3. *The objections to the charts; the verity of the respective stories.*

The court will perceive that the real conflict is as to the positions and movements of the *Newfoundland* from 5.30 p. m. of July 19 to the capture at or near 10 p. m. The contrast between the two stories is graphically shown by the charts in evidence. The claimants assert that the *Newfoundland* was from 7 to 10 miles farther offshore than the navy story shows her to have been; until at the point of capture the difference is 4 miles. The appellant complains (brief, pp. 25, 33) of the introduction of Lieutenant Culver's diagram and the superposition of the data therein shown on the claimants' chart. They state that this chart was properly in evidence, because the positions there shown were ascertained by the master by actual observation and according to scientific rules, while the captors' diagram was merely composed from hearsay information and approximate estimates.

Examining the facts, we find that the court admitted the diagram and requested the addition of its data to the claimants' chart in the face of the same objections urged here (record, pp. 70, 134). The captain says he noted the ship's position at the usual intervals during the voyage on the chart from a memorandum book which was still in his possession (p. 86). The chart was not placed

in the possession of the prize master, as it should have been if it was a ship's paper; and, if private, it really should not have been admitted at all into the case (United States attorney's objection, p. 90). The captain admits (p. 107) that he drew certain lines on the chart after the prize master went on board, and being asked on cross-examination (id.), "Were those points, all of them, on the chart at the time when he went on board?" he answered, "I am not sure about all of them; there are some points here not on the chart that I have put on since; they have reference to the position." He says (p. 92) that his chart position places the ship 17½ miles off Havana when they passed the light. The court's attention has been specially directed in the main Government brief to the variation from this statement in the mate's entry in the log, which showed Havana light bearing south 10 miles at that time (rec., p. 118), and the point is now reiterated to show the unreliability of the captain's chart. The mate endeavored, neither successfully nor consistently, to change the fact, and stated the distance to be variously 15, 16, or 17 miles (id.).

On the other hand, Lieutenant Culver states (p. 70) that the only part of his sketch which could be regarded as hearsay is the location of the *Tecumseh;* that he made the tracing based on bearings he took himself, located the ship at the time the *Newfoundland* light was sighted, and located her again at the time the *Newfoundland* was overhauled. He added the position which was given to them by the officer of the *Tecumseh.* This sketch was made on the forenoon of the next day (id.). Captain Mackenzie states (p. 52) that the work was done by Mr.

Culver from the log—from the run of the ship—he being the person charged with that work on the ship; and he adds: "The thing is very close, but the first position and the final position are quite accurate." Now, it will be remembered that the first position was that at 8.30, and that, as Captain Mackenzie said (id.), "Her position [the *Newfoundland's*] at 8.30 by the log and our position agreed almost exactly." Mr. Pratt says (showing the accuracy of the *Mayflower's* log entries, from which Lieutenant Culver obtained the facts for his tracing): "I had been told to take bow and beam bearings of the Morro" (p. 75). Such bearings would give accuracy within a quarter of a mile (id.). And it clearly appears that he was taking it when the *Newfoundland's* light was sighted. The bearings so taken, and thirty-five days' experience in blockade service, were the basis of his estimates.

Then, as to the location of the *Tecumseh*, asserted by the claimants to be either hearsay or mere guesswork—it was not hearsay, because on pages 79–82 both Lieutenant Evans and Mate Nickerson confirmed and verified the position by the tracing. The latitude and longitude of the *Tecumseh's* position was based upon cross-bearings taken at noon of that day, with allowance for drift. While Lieutenant Evans states that the position of the *Tecumseh* when the *Newfoundland* was sighted was an estimation (but made in the light of a previous observation), his customary station between the prescribed bearings of the Morro enabled him to verify the location by the distance of 6 or 7 miles north and east of the Morro, and about 3 from the nearest shore; so,

also, Mate Nickerson; and they allow liberally for discrepancy by not assuming to fix the position at boarding nearer than 3 miles. This is not loose guesswork. From the testimony it is plain that the *Newfoundland*, when boarded by the *Tecumseh*, was at the farthest 8 miles offshore, instead of 14, as the claimants say. It is upon this asserted distance at that point, which is disproved by their own testimony, that the entire fabric of their subsequent contentions and arguments rests; although, even if that distance were granted, there would be the same difficulty as to distance passed and time consumed in the interval between 5.30 and 10 o'clock to account for.

As to the time for the various events with reference to the *Tecumseh*, there is no uncertainty or inconsistency in the testimony of her officers. The mate is positive as to the time of boarding and of return to the *Tecumseh*, and Lieutenant Evans submits the log showing the times of sighting and boarding, and corrects the question on cross-examination by which the hour of departure of the *Newfoundland* was fixed at 6.30, by fixing it at 6 o'clock, or very near that hour.

Although the appellant's brief undertakes to do away with the effect of the mate's log entry and assumes to show that the position of the *Newfoundland* at 8.20 or 8.30 p. m. is not proved by the officers of the *Mayflower*, we submit again that the position is very exactly proved by the agreement between the *Mayflower* and the *Newfoundland's* log as to the bearing and distance of the Morro at that time, as well as by the *Mayflower* testimony.

As to the rate of speed of the *Newfoundland*, the captain says that the average rate was about 7½ knots (pp. 95, 97); that from the time of stoppage by the *Tecumseh* until 10 o'clock the rate of speed would figure out about 7¾ knots (p. 98). He told Captain Mackenzie 8 knots (p. 99). The engineer speaks only of engine revolutions, 65 being the greatest number of which the ship was capable when light, 60 the ordinary average number. They were running 58 revolutions at the time they were stopped by the *Mayflower* at 10 o'clock (pp. 125, 126). Whatever the relative speeds may have been at these revolutions, he says (p. 129) that, burning somewhat less coal than they had burned on the first days out from Halifax, they had made full speed from Havana to Charleston, with their load, on revolutions running 60, 63, and 65. It thus appears that the captain himself gave the basis for the theory that the rate of speed of the *Newfoundland* was 8 miles per hour, and that both he and the engineer were highly inconsistent on the subject.

The appellants' brief then goes on, viewing the charge against this vessel as a mere "theory" of the captors and the court below, to construct a hypothetical defense somewhat to the following effect (pp. 52–61):

They start with the assertion that the positions and courses of the *Newfoundland* previous to the meeting with the *Tecumseh* must be accepted as proved, the facts being laid down on the chart of the master and not disputed by any direct evidence, and the log of the *Newfoundland* having been in the possession of the United States attorney. They carefully refrain, however, from bringing forward their log to fortify any of their statements. They

then attempt, upon the testimony of the *Mayflower's* officers as to their actions immediately after the *Newfoundland* light was sighted, and the courses and rate of speed of the *Mayflower*, to work out the exact direction and distances of the successive runs and to check their calculation by working the result back, and find that there is a variation of 3 or 4 miles in the stated positions of the *Mayflower*, both at the beginning of the chase at 8.30, and at the conclusion at the point of capture, about 10 o'clock. This amounts to very little, because the *Mayflower's* officers do not profess to state the details of the intermediate run with exact and mathematical accuracy, and the claimants allow nothing for the successive slowing and starting and the consequent loss of time and distance as the *Mayflower* changed her course. Proceeding on the assumption of the correctness of Captain Malcolm's chart positions from 12 o'clock, noon, on, they state that to bring the vessel out where the *Tecumseh* says she was, they must have proceeded, not west, which the chart and the testimony show, but first west, then southwest, and then again west. But her previous positions are not so clearly and frankly proved as to be accepted as verity, and we are dealing with a variation in the stories from the point where something like exact knowledge begins, that is, at 5.35 p. m., when the *Newfoundland* was 5 to 8 miles off land instead of 14, as they say. If she had been 14, their detailed figuring out of their time and their distances might bear some examination. And again, if they had been 14, the apparent impossibility of the runs, courses, and distances, which they attribute to the Navy story, as shown on their chart, interleaved at page 58, might

stand scrutiny. But the entire structure of their argument falls when their distance from land at 5.35 is shown to be 7 to 8 miles and not 14.

Again, the engineer's log and testimony show that little reliance can be placed on what he says as to the speed of the engines, and the claimants' attempt is largely based on the verity of his statements; and in presenting the subject they continually refer to the "theory" of the captors, which the court, as they say, erroneously permitted to prevail over the "contrary proof of the master of the ship, of his chart, and of the ship's log and the engineer's log" (p. 60). We again submit that they bring no proof from their log to sustain their contentions, and that the log proof plainly adduced in the record undermines the foundation of the argument by showing that the vessel at one crucial point of time (that of passing Havana) was 10 miles, and not 17 miles, offshore.

Now, if the vessel had been 14 miles offshore at 5.35 p. m. (the claimants' chart in evidence, by the way, and their hypothetical draft based upon it at page 58 of their brief, give an entirely misleading comparison of the respective claims as to distances at any of the points and places, they being much farther offshore by this visual scale than they were even according to their own account), they would, standing one point north of west at 6.30 until 8 o'clock, have reached at 8.30 a point about 17 miles from Havana, and then, if they had kept due west, would have been about 21 miles generally northwest of Havana light at the time of capture. But so also, if they had been, as we claim they were, 7 to 8 miles offshore at 5.30 when boarded by the *Tecumseh*,

standing on a point north of west until 8, and then west, it would have brought them off Havana light at 8.30, at the distance which their own log says they were, viz, 10 miles; and then, if they had proceeded due west, as they claim, they would have come out at the point of capture, 17 miles northwest of Havana, as the Navy say. If a due-west course after 8.30 would have brought them out less than 17 miles, then we submit that the Navy account of the *Mayflower's* chase, showing obvious changes of course by the *Newfoundland*, indicates such deflections from the alleged course as would naturally bring her out somewhat farther away than an undeviating western course; and this is only one of the many points of inconsistency which raise the grave doubt and pregnant suspicion in the case.

Further, their own statement of the distance from land at the time of capture, 13 or 14 miles, is another indication that the distance of the Navy account from Havana is true rather than the claimants' statement of distance then. Now, if they were 17½ miles off Havana at 8.30, and kept due west, at 10.30, when they were captured, they would have been not 13 or 14 miles off land, but about 21, their distance from Havana, because the Cuban shore to the westward of Havana falls away to the south.

Still further, if they were 17½ miles offshore at 8.30, and kept due west and were 17½ miles from Havana when captured, which we say is the correct distance, not only because of the Navy testimony, but because of the patent facts relative to the visibility of the Havana light (and even because of their own testimony on this point),

then, notwithstanding their claims, they must have deflected to the south of west at some point between 8.30 and capture.

It does not at all weaken the Government's story, which is based upon the view which the facts themselves plainly suggest that the *Newfoundland* was not at all times on the evening of July 19 proceeding due west, except for the slight deflection north of west from 6 o'clock to 8, to grant that the Navy story shows that the *Mayflower* sailed generally northwest from the time the chase began until its conclusion. The *Newfoundland* may or may not have been sailing northwest all the intervening time; it is sure they were not sailing west all the time; they may have been and probably were sailing northwest as well as in various other directions for part of the time. Their general course was somewhere between west and northwest to bring them out, not about 13 to 14 miles northwest of the Morro at 10 o'clock, about which point they would have reached if they had sailed *very slowly* due west from the point 10 miles off Havana at 8.30, but 17 miles away from the Morro when they were captured. Just what courses and distances they sailed in that intervening time is a mystery in the case. Some time during the interval they probably made up their mind that they had been thwarted, and tried to get away in any direction, and then their conclusion would naturally be the farther to the northwest the better.

They also assert and reiterate the supposed conclusion, based upon the hypothesis of the *Newfoundland's* chart positions at 4 p. m. and previously being correct, the ab-

surdity and impossibility of the results as to courses and distances which they think the Navy story involves, and which their sketch at page 58 of their brief brings out, and claim that on this assumed state of facts they must all the time from 5.35 p. m. have been sailing farther and farther away from Havana on courses generally northwest. This theory is simply interjected into the case, and is an interesting pictorial view of something that does not belong in it and nothing else. The Navy testimony is clear and certain, viz, 7 to 8 miles offshore at 8.30, confirmed by the *Newfoundland's* own log; 17 miles from Havana and about the same distance offshore at the point of capture, and what was occurring on board the *Newfoundland* between 8.30 and the point of capture is still a mystery. The Navy witnesses do not profess to say. It is certain that the *Newfoundland* was not proceeding due west, because if she had been she would have been farther west than the point where she was captured at her normal rate of speed; and while she probably concluded at some time between 5.30 and 10 that the desired entry into Havana was impossible, and so have directed her efforts after 8.30 chiefly to getting away, and thus have been running when she was captured northwest or thereabouts, as we argue in the main brief, her offense had already been committed, and it should make no real difference that she was seized on the western rim of her circle of attempts and not east of a north and south line through Havana.

The *Newfoundland's* log, upon the verity of which the claimants base their chief reliance, but which they only bring forward now in a vague way, either was or was not

in the case below. If it was, it speaks for itself, and the importance of drawing upon its detailed facts for use in their brief is obvious. If it was not, and yet was of importance to them, they had an opportunity to introduce it below and did not avail of it, and therefore it is now to be received here with great caution, and that it proves what it is supposed to prove is not to be assumed as verity; and a reason is thus readily suggested why they did not choose to introduce it below or incorporate its assertions in their brief. Though there was no testimony from the *Hudson* showing where the two vessels were at ~~1 p. m.~~ 11 or 11:30 a. m. on July 19, when the *Hudson* boarded the *Newfoundland*, the mere statement that the *Newfoundland's* chart record of that point should be assumed as proved is not conclusive or satisfactory, and is not admitted. Now the log appears to have been an original exhibit in the case.

The appellants suggest (p. 4) that the *Mayflower* might have seen many other "faint lights," and that it was merely assumed that the faint light seen at 8.30 p. m. was the *Newfoundland*, and no other ship. But the night was clear, according to all the accounts; the Morro light was burning and was seen at a distance of 21 miles; the officers of the *Mayflower* were alert and vigilant at all times under their duty and the service they were performing, and especially so after 8.30 p. m. on this evening. They speak of no other lights, and do not intimate that there were other vessels in that neighborhood cruising about without the regulation lights, and it is fully evident that there were no other vessels of the blockading squadron in that immediate neighborhood at that particular time.

4. *As to certain authorities on "loitering."*

Beginning at page 67, the appellants' brief considers the doctrine of *cy près* approach and the right of neutral merchant vessels to come near or into blockading lines, and states the rule given by the writer on the law of nations, Bynkershoek, that vessels near a blockaded port may be seized, but their intent to enter must be beyond doubt. The Government contends, as the basis for the seizure and condemnation, that the intent to enter was beyond doubt; that all the circumstances showing a course of preparation are to be considered as establishing the intent; that the acts of this vessel constituted overt acts of carrying the intent into execution, and that an overt act, in the sense of a heading for the port of Havana and an open endeavor to run into the same, is not necessary in the case. It is to be remembered that the details of their run from Nuevitas west show that their speed was so regulated as to bring them a little east of Havana at dusk.

Concerning the effect of a false notice by a blockader, there was no such result of the *Badger's* warning as to reduce this neutral to the kind of distress referred to by Sir William Scott in the case of *The Henrick and Maria*, (1 Rob., 146). (Brief, p. 79.) The commander of the *Badger* honestly thought that there was a blockade of the entire coast, and told the master he could go west, but not to attempt to enter anywhere. All that the master had to say then was that his instructions were to enter Sagua or Caibarien, if not blockaded, but that his real destination was Kingston, and thereupon to turn round

and proceed to Kingston by way of Cape Maysi. And it is always to be remembered that the captain did not see the written instructions from the charterers to the former master and managing owner and claimant here. He says the instructions were verbally stated to him by Captain Farquhar; they were not left in his custody, and they have never appeared in the case (pp. 30, 31, 32, 85, 105).

The court below says nothing about superior education or makes any comparison on that subject between the claimants' witnesses and the Government witnesses. He speaks quite properly of the usual tests by which testimony is weighed, and especially of the effect of interest, and merely refers to the Government witnesses as men of education, character, and intelligence, whose testimony could not be discredited without imputing to them a reckless carelessness for which there is no warrant. That was not to impute to the other side any such carelessness; it merely brought out the fact, which is a fact in the case, that there was no interest at all on the part of the *Tecumseh's* witnesses, or any such interest on the part of the *Mayflower's* witnesses, as could be compared with the claimants' interest.

5. *As to certain decisions cited by the appellants concerning intent and the onus probandi.*

The claimants submit (p. 93) that suspicion of intention can not take the place of proof of acts. This was not a case of mere suspicious circumstances, such as *The Wren* (6 Wall., 582) or the other cases on that point which are cited. The intention was clear; it was defi-

nitely and distinctly shown by all the acts of the vessel from the time she was warned by the *Badger* at Nuevitas on. The intention, therefore, being clear, the knowledge of the Havana blockade undoubted, the fact of sailing with the intention makes the case upon the final facts as to the loitering about Havana, in view of the decisions as to *cy-pres* approach which are discussed in the main Government brief, entirely complete and convincing.

In *Fitzsimmons* v. *The Newport Insurance Co.* (4 Cr., 185), Chief Justice Marshall holds that even persisting in an intention to enter a blockaded port after a warning is not attempting to enter it; but this is said in the light of the fact, which is obvious from the opinion itself, that the intention in that case was evidenced by no fact whatever. Can that be said of this vessel's actions in this case?

The appellants draw a distinction on the well-established rule in prize by which the *onus probandi* of neutral interest rests on the claimant, between the mere question of the neutrality of the property, and the question of criminality. We do not understand upon what this distinction can be founded. It is true that condemnation in prize involves the accusation of guilt (in a general sense) and the plea of innocence, and that in condemnation for breach of neutrality the question is as to the innocence or guilt of the vessel. But neutrality forfeitures, like revenue forfeitures, are very different from proceedings in prize, which is a peculiar jurisdiction and subject to many rules different from ordinary legal rules. Proof of property, for instance, lies generally upon the claimant. (The Countess of Lauderdale, 4 Rob., 283.)

A prize proceeding is not to be regarded as criminal. Nor is there any foundation for importing into the case what claimants say is the uniform fundamental rule in all cases, civil or criminal, which places the burden of proof on the plaintiff. The rule about the burden of proof in prize is, as we have stated, just the other way, and, the vessel being seized and brought to adjudication, not only the burden of proof as to neutrality, but the burden of proof as to innocence of illegal intent or attempt, and as to good faith and the absence of fraud, clearly rests upon the claimants. (*La Amistad de Rues*, 5 Wheat., 385; *The Amiable Isabella*, 6 id., 1; *The Santissima Trinidad*, 7 id., 283; *Johnson* v. *Thirteen Bales*, etc., Fed. Cas. 7, 415.)

The contention that the *onus probandi* is on the claimants in all respects is suggested at least by statements in both the *Springbok* and the *Peterhoff* cases (5 Wall., 1, 22; id., 28, 62), namely, that frankness and truth are especially required of the officers of captured vessels when examined in preparation for the first hearing in prize, and that neutrals engaged in a commerce open to great suspicion are most strongly bound to frankness and good faith. And the same inference is to be drawn from *The Cornelius* (3 Wall., 214), in which it is held that "presumption of an intent to run a blockade by a vessel bound apparently to a lawful port may be inferred from a combination of circumstances, for example, * * * the fact that the vessel on her outward voyage was in the neighborhood of the blockaded place and within the line of the blockading vessels *by night;*" * * * and that, "although in such cases it is a possible thing that the

intention of the master may have been innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intent." It is true that in the *Cornelius* Case there were other elements of suspicion which fortified the presumption.

From all these cases, we respectfully submit, the inference is plainly to be drawn that where any evidence of fraud or bad faith appears, the neutral claimant must repel it. (See also *The Bermuda*, 3 Wall., 514.)

Finally, upon this point, we submit that even if there is authority for the opposite contention we have fully shouldered the burden of proof in this case.

In conclusion we submit to the court certain decisions of Dr. Lushington during the Crimean war.

In *The Steen Bille* (Spinks's Prize Cases, 161), the question was whether the vessel was going to Stockholm, her proposed destination, or really to Riga, a blockaded port of the enemy. The court says:

> If this vessel was really going to Stockholm there was no breach of the blockade, and a knowledge of the blockade matters not. * * * Much evidence has been adduced to show that the place of capture was in the proper course to Stockholm. I am not convinced by this evidence, but do not mean to decide as if I wholly discredited it. This is abundantly clear, that, though it might be a proper course for Stockholm, it was also a proper course for Riga. How, then, am I to be satisfied as to which place the master was really conducting the course of his vessel? I must look to the whole of the evidence and see whether it is true and consistent—whether the master is deserving of credit or not.

The learned judge then compared the master's evidence with the log, showing that the ship was not going voluntarily to the northward or the westward (that is, it appears, away from Riga), but that the course was as near as she could possibly lie to Riga. The log in that case showed that the vessel was moving, when she did move, to the east and not to the west, which the captain explained by saying that while at the time of capture he was standing in rather far to the east, this was because he expected the wind to be wearing easterly and wanted to make the most of it when he again tacked. These and other facts as to the wind, affecting the vessel, of course, as a sailing vessel, no doubt influenced the court largely in the view that the master was discredited by his own log and his own statements; and the court also found as a fact that there was a letter on board which went further to show not only a mere doubtful destination, but the forbidden destination, and this makes that case so far stronger than the present one. The court then concludes:

> I can not entertain any reasonable doubt that the vessel was going to Riga in breach of blockade; and the steps which have been resorted to in order to conceal the true destination perfectly satisfy me that all parties were cognizant of the blockade. Of course I must condemn the ship.

In the case of *The Union* (id., 164), a Danish vessel was captured off Lyser Ort, at the entrance of the Gulf of Riga, alleging an intention to make inquiries whether the port of Riga was blockaded, and if so, to go to a neutral port. This affects the intention in the present

case as to Sagua la Grande and Caibarien. The opinion of Dr. Lushington says:

> They chartered a vessel for Memel, and being uncertain whether Riga was blockaded or not, they sent her to Riga; or, according to another version, to inquire of the blockading force whether Riga was blockaded. Is this justifiable? Under particular circumstances perhaps it may be justifiable, where information can not be otherwise procured, to inquire of the blockading force; but how can that excuse prevail in the present case? Where was the difficulty of inquiring at Memel, a neutral port, which lay in the very track, and to which port this vessel was, according to one account, primarily chartered? The owner, indeed, swears that the vessel could not inquire at any neutral port without great expense and loss; but I must be excused from giving credit to a statement which is not justified by the undoubted facts of the case.

The court evidently agrees with the established view that the law does not permit such an inquiry, because, after considering other features in the case and the ambiguous clearance, which showed the neutral port to be in reality a false destination, the opinion adds:

> Even if justified in the course he adopted, he has not honestly pursued it; if candid, the destination on the papers ought to have been, "to Riga, and, if blockaded, to Memel." Such would have been honest, *even if the law had not permitted it.*

And the judgment in the case was also undoubtedly affected by the palpable contradictions as to destination, shown by letters on board. It is true that one of the destinations thus shown was the clearly forbidden one,

Riga; and here, though the destinations are clearly contradictory, the interdicted port of Havana does not appear upon the face of the papers.

We therefore respectfully submit, in reply to the appellants' brief (in which there is perhaps an excess of indignant and protesting disclaimer and assertion that this was a gross trespass without probable cause), that the decree below was properly entered, and that the court should affirm the same, with costs.

HENRY M. HOYT,
Assistant Attorney-General,
For the United States.

JOSEPH K. MCCAMMON,
JAMES H. HAYDEN,
For the Naval Captors.